Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1997

RICHARD L. TAYLOR,

*Petitioner,*

*vs.*

CITY OF PONCA CITY, OKLAHOMA, *ex rel.* THE PONCA CITY POLICE DEPARTMENT and CHIEF RAYMOND HAM,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the federal court err in granting summary judgment to the City and City Police Chief Ham thereby depriving police officer Taylor of his liberty and property without due process of law.

Did the federal court err by not granting plaintiff's Federal Rules of Civil Procedure Rule 56(f) motion when an obstruction of justice by city officials; and, a refusal by Ham to submit to a court-ordered deposition, prejudiced Taylor in his collection of evidence to be used to oppose the City's Motion for Summary Judgment.

## PARTIES TO THE PROCEEDING

The parties identified in the caption are all the parties to this appeal. Police Chief Raymond Ham was the cross-appellant below, seeking protection from court-ordered discovery on the basis of sovereign immunity. Other parties, dismissed from the District Court proceedings, who are not parties to the appeal are Everette Van Hoesen, Bob Stieber, and Don Ray.



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Petitioner, Richard L. Taylor, ex-police officer for the City of Ponca City, respectfully requests that he be given a proper post-termination hearing on his termination from employment as a police officer and therefore a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not reported and not to be used as, ". . . [B]inding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel." The opinion of the district court in *Taylor v. City of Ponca City, et al.*, United States District Court for the Western District of Oklahoma, CIV-95-1650-M is not published.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on December 30, 1997. No petition for rehearing was filed before the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging freedom of speech. . . ."

42 U.S.C.A. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

## STATEMENT OF THE CASE

The fundamental question in this case is whether the termination of a police officer hired under and protected by a "just cause" collectively-bargained-for-employment, publicly accused of criminal behavior, entitles that officer to pre- and post-termination hearings pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. Also at issue is



the City's refusal to provide the Chief of Police, Raymond Ham for deposition which prevented him from making a record in opposition to the City's Motion for Summary Judgment granted in its favor. To fully appreciate the significance of the issues presented by this case, it is essential to consider the facts surrounding Taylor's termination from employment with the City of Ponca City, the City's refusal to provide a fair pre-termination hearing and a full post-termination hearing and Ham's refusal to obey a court order to present himself for deposition in order for Taylor to adequately respond to the City's Motion for Summary Judgment, ultimately granted in its favor.

Taylor, terminated from public employment as a police officer, by his employer, appellee, Ponca City, Oklahoma and Police Chief Raymond Ham ("City"), stated a claim under I, V, and XIVth Am. U.S. Const. and 42 U.S.C.A. § 1983 for deprivation of property and liberty without due process of law when city employer wilfully terminated him without just cause; biased his pre-termination hearing; published false statements to the public that Taylor was guilty of manslaughter; failed, for over 16 months (and continuing), to provide a reasonably prompt post-termination hearing in accordance with the applicable collective bargaining agreement's requisite time periods; failed to notify Taylor of untimely filed motions seeking delay of post-termination hearing before the arbitrator; interfered with Taylor's union rights; refused to obey District Court's Orders regarding discovery; intimidated witnesses during discovery; stated policy of waiting until employee criminal trial concluded before complying with contract arbitration requirements setting post-termination hearing; and failed to reinstate him following "not guilty" verdict at the criminal trial.

Taylor was employed with the City of Ponca City Police Department ("PCPD") as a police officer from September 23, 1985 until his involuntary retirement ("termination") on

February 17, 1994, by PCPD Chief Raymond E. Ham ("Ham"). At all times relevant to this controversy Taylor was a Union member. The Union was recognized as the exclusive representative of the PCPD Police Officers under the *Agreement of Recognition Bargaining Procedure and Operating Contract between the City of Ponca City, Oklahoma and Fraternal Order of Police Lodge 103* effective the fiscal year 1993-1994 ("CBA", App. 41-80, Art. I[B]). The CBA contains a just cause termination clause (App. 44); and a mandatory and binding arbitration clause. (App. 64-70, Art. XXVII[B] [Step 5][d]).

Taylor was terminated pursuant to Policy No. 1.1.5a, Article 7 of the *PCPD Policies and Procedures Manual* ("Manual", App. 120-336), which states, to-wit:

> Any officer or employee whose actions or conduct are such as to cause him to be charged, bound over, indicted, or held to answer for any criminal matter, provided such charges are not frivolous and wholly without foundation, shall be subject to disciplinary action.

The Manual was written and published by Ham, with authority from the City. (App. 91).

The CBA supersedes the manual which superseded the City of Ponca City Personnel Policies and procedures Manual. (*See* App. 642 [Tr. p. 122]; App. 87; App. 120).

Taylor was terminated solely because of the filing of a felony charge of First Degree Manslaughter brought against him in Kay County, Oklahoma. Taylor was terminated solely because of the filing of a felony charge as that was the deciding difference between Taylor and past employment practices in the area of discipline for alcohol related traffic offenses and because at the



time of the termination Taylor had not yet been found guilty of any of the criminal offenses listed as the basis for the termination in the City Notices. (*See* App. 651 and 666).

The criminal charge arose out of the following facts. On December 18, 1993, Taylor was involved in a single car accident occurring in Kay County. The passenger riding with him died and Taylor was injured. Taylor was twice notified of impending disciplinary action. (App. 31).

Prior to suspension and due to his injuries from the accident Taylor sought sick leave as an entitlement under the CBA. (App. 31 and 32). On January 7, 1994 Taylor was placed on suspension *without* pay and his sick leave and court compensation time request was denied (App. 32). February 4, 1994, Taylor was notified to attend a February 14, 1994 Internal Board of Inquiry and Recommendation ("IBIR") hearing, the purpose of which was to review and recommend specific appropriate disciplinary action to be administered Taylor. (App. 31).

On the 14th day of February, 1994, PIEL was ordered by Ham to serve on the IBIR. As a member of the IBIR, PIEL was charged, along with two other officers, Asst. Chief Van Hoesen and Gary Ingmire, with administering Taylor's due process rights in the form of a pre-disciplinary hearing convened as a result of a felony charge brought against Taylor by the State of Oklahoma for the events described in paragraph 3 above. (App. 33 and 287, No. 52.1.3).

The IBIR is a body of officers organized pursuant to the Manual No. 52.1.3. (App. 287). Under this policy the officers comprising Taylor's IBIR were selected by Ham. The IBIR's stated purpose is to protect Taylor's "due process" rights. (App. 287, No. 52.1.3 [Policy]). The City and the PCPD's IBIR wilfully and intentionally destroyed the IBIR's impartiality as

to Taylor depriving him of his liberty and property without due process, when they, to wit:

a. wilfully denied Taylor's due process mandated by the Constitution, the CBA and the Manual, including Numbers 11.4.1 ("the Chief is to try and correct any improper condition revealed"); 52.1.2 by circumventing the required independent confidential Internal Affairs investigation; and 52.1.4, inasmuch as Taylor was not notified of the final disposition of the complaint within the time limit as specified by the CBA, *i.e.* 45 days, *and* what penalty assigned, if any (App. 32-36, CBA Art. XXVI[D][2][b], App. 66);

b. immediately following the accident and post-termination, published, about Taylor, to the community through Television and Newspaper media, false, defamatory and professionally stigmatizing, and embarrassing statements concerning facts, relevant to PCPD inquiry (*i.e.* "Officer Taylor's drunkenness caused the accident killing Taylor'S friend" or words to that effect and publicizing Taylor's firing for drinking and killing his friend), required to be confidential pursuant to and in violation of Manual Nos. 1.1.5a, Arts. 4.4 (rumors) and 22 (confidential information); and, 52.1.2 (Internal Affairs Procedure) (App. 32 and 669);

c. wilfully deprived Taylor of his right to confront evidence against him *per* unconstitutional Manual No. 52.1.3 [Hearing], to wit, "The accused officer does not have the right to cross examine witnesses" when applied so as to deprive Taylor of his right to confront the evidence relied-upon by the IBIR and used to terminate Taylor's public employment (App. 32);

d. wilfully refused to afford him a meaningful and impartial pre-termination hearing when the IBIR held a secret hearing, approximately one hour before the IBIR hearing attended by



Taylor, at which time IBIR members Piel and Ingmire were intimidated, prejudiced and ordered by Ham, and Van Hoesen, at Ham's direction, to recommend, regardless of the evidence and past and present PCPD employment practices, Taylor's termination from the PCPD; and conducted the IBIR hearing without publicly stating to Taylor its recommendation; and wilfully failed to publicly cast and record its vote as to the proposed recommendation (App. 32-33);

e. refused to "list the evidence" against Taylor, as required by Manual No. 52.1.3 [Hearing] thereby depriving him of the right to meaningfully confront any evidence offered against him, or to present the evidence necessary to present his defense (App. 33);

f. refused to impartially listen to evidence presented by Taylor which completely refuted the charges listed in the "Notification of Hearing" (App. 33 and 39);

g. wilfully refused and failed to publicly (at the hearing), properly and timely announce the effect the incident had to Taylor's continued employment; and IBIR-recommended discipline for Taylor *per* Manual No. 52.1.3 (App. 33 and 287), to wit:

> I. "PROCEDURE . . . The IBIR will review the investigation file and hear from the officer any mitigating circumstances or reasons for his actions. The IBIR will then give to the chief of police, or his designee its recommendation. The chief of police or his designee will consider the IBIR Board recommendation. The recommendation can be followed or altered by the chief of police or his designee.

ii. *At this point, the chief or his designee will advise the officer what punishment, if any, he is prepared to issue*" (emphasis added); and

"The purpose of the pre-hearing is to determine . . . what effect these reasons will have on your continued employment . . ." and, "what action should be taken in regards to" continued employment.

This wilful refusal to follow established procedure deprived Taylor the opportunity to offer evidence of prior city practice of discipline administered in similar cases; the opportunity to argue against the recommended discipline; and to offer resignation, or, other settlement rather than be terminated or litigate (App. 33);

h. wilfully violated policies and procedures when Van Hoesen signed, on behalf of IBIR member Gary Ingmire, and secretly submitted, to Ham, its Findings and Recommendation to terminate Taylor's employment with the PCPD, resulting in Taylor's termination and violating Manual No. 52.1.3 (App. 33 and 393); and

I. wilfully refused to pay wages and benefits earned by Taylor and in the form of "Retirement Sick Leave" (App. 3 Art. XXIII) in the sum of $3,048.72; and "Compensation Time" (App. 3 Art. XVII) in the sum of $102.48 for an 8 hour court appearance on January 11, 1994. (App. 33).

The City and Ham acted to deprive Taylor of guaranteed rights of due process as contained in the CBA, they, to wit:

a. refused to comply with CBA Art. XXVI(D)(2)(A) thus depriving him of seasonable notification of the charges brought against him, so as to fully inform him of the nature and



circumstances of the alleged violations so as to be able to properly defend himself. (App. 34).

b. refused to give him the same Constitutional Rights as any citizen, *per* CBA Art. XXVI[D][3], by using "charges" as an independent basis for termination. (App. 34);

c. wilfully failed to notify Taylor within forty five (45) days of the initial complaint and advise him of the penalty assigned *per* Manual No. 52.1.4, (App. 34); and, in CBA Art. XXVI[D][2][b], (App. 65-67);

d. wilfully terminated him without just cause as required by contract thereby treating him dissimilarly from similarly situated prior and post Taylor-termination offenses committed by PCPD officers (App. 34, CBA Art. IV[A][6], App. 44);

e. wilfully terminated him without just cause applying pressure by high ranking administrators to certain IBIR members (App. 34 and 39);

f. wilfully deprived him, by the use of artifice, delay and legal confusion, of his constitutionally guaranteed right to a full, expedient and impartial post-termination hearing, thus, wilfully refusing to arbitrate his termination grievance notwithstanding Taylor's seasonable exhaustion of all pre-requisite grievance steps (App. 35, 36 and 365-378, Art. XXVII and 15-24);

g. wilfully created and ignored conflicts of interest in Union membership by allowing ranking administrative officers to be members of the Union who have in turn represented and advocated interests adverse to Union membership and using their influence as ranking administrators of the PCPD to intimidate Union members from performing their Union duties. (App. 35).

Taylor was acquitted of all charges, including Driving Under the Influence and First Degree Manslaughter. (App. 656 and 668).

Taylor has never been given the opportunity to refute the evidence against him that allegedly support the reasons given for his termination (App. 32-36), other than his successful defense of the criminal charges.

Despite being informed of alleged conduct which formed the basis of the allegations against him by the City, Taylor was never given a summary of the evidence or notice of the specific factual allegations which formed the basis of his termination. (App. 654-658).

The procedures for the IBIR were not followed. (App. 654-658, No. 52.1.3).

Taylor denies receiving the February 4, 1994 Hearing Notice as stated in the City's "Statement of Facts" number 6. (App. 654-658).

The City, in its IBIR hearing, completely ignored all of the evidence as to the cause of the accident of December, 1993. (App. 666).

This IBIR was influenced by Chief Ham. (App. 666).

Taylor was deprived of an opportunity to offer evidence of prior city practice of discipline administered in similar cases, to argue against the recommended discipline and/or offer resignations rather than termination. (App. 33).

Taylor was denied his right to have an impartial decision-maker render the decision regarding discipline as Ham claims



to be a witness to Taylor's intoxication on the night in question, controlled the IBIR, suspended Taylor without pay and without authority, and terminated Taylor without giving him proper notice of the evidence and without following PCPD Policy No. 52.1.3 the stated purpose of which is to provide the accused officer with due process. (*See* App. 654-666).

Ham has been present and pressed termination and support for his decision at all levels of review and thus unfairly influenced other decision-makers such as City Manager Martin. (App. 654-666). Moreover the City is unable to show that a full post-termination hearing was ever held.

The City is responsible for the publication of the circumstances surrounding Taylor's termination which the City does not deny is stigmatic and false. (App. 669-671).

Ham is responsible for the publication, through a private citizen, D. Bohon, to the employees of J.C. Penny's in Ponca City Oklahoma that suspended Taylor would be fired because he guilty of a felony and would receive a two year prison sentence for committing the felonious manslaughter of Mike Morris. (App. 670-671).

The City and/or Ham has communicated with the arbitration panel and filed motions without notice to Taylor or his legal representative, Ken Holmes. (App 654-655). Mr. Holmes denies that he ever stated to the City or Ham that Taylor received due process in the course of his pre or post termination procedures. (App. 673-677).

Taylor has been denied subsequent public employment with the City and as a police officer in other surrounding communities due to the circumstances surrounding his termination as an officer with the City. (App. 38 and 655).

City policy makers issued statements, policy or custom of motions conducting arbitration until after the criminal trial in the derogation of CBA rights. (App. 377).

At all times relevant herein, Plaintiff's counsel, Mary Rounds and Andy Lester had an agreement to cooperate with discovery and to not require either party to have to respond to respective dispositive motions without first having completed the depositions sought by each side. On the 8th and 9th day of May, 1996 the depositions of Gary Martin, Jana K. Howell, Everett Van Hoesen, Don Ray, Bob Steiber, Don Bohon were scheduled with Taylor's response time to Defendants dispositive motions in mind and pursuant to agreement between counsel. (App. 49).

The criminal trial of *State v. Richard L. Taylor* (the plaintiff) commenced in March of 1996. The trial lasted more than one week and interfered with scheduled discovery in the instant case. Due to the failure to make discovery agreements to extend discovery, the response time were agreed upon by counsel. The latest agreed response time requires that Taylor respond by Monday May 13, 1996 to the City's, *et al.* dispositive motions. In support of the City's agreement to extend discovery and disclosure of witnesses Taylor offers the affidavit of Kelly Renné and Kathleen Briggs. (App 492 and App. 518-521).

The City informed this counsel that they sought to limit discovery based upon the qualified immunity defense and was going to quash the notices of any deposition in order to test the legal sufficiency of their arguments. Taylor noticed the depositions for the 29th and 30th day of April, 1996. These dates were specifically requested by the Defendants' counsel in order to accommodate their schedule. Shortly thereafter the Defendants filed their objection to the continuation of discovery, the production of documents and the taking of the depositions



and sought a protective order on their qualified immunity defense. (App. 493).

On or about the 16th day of April, 1996 The City sent additional documents that were required to be disclosed under self-compelled disclosure rules (these documents show additional due process violations suffered by Taylor as they show City communication to the arbitration panel without affording Taylor notice and opportunity to respond). The City still refused, despite several good-faith efforts by the undersigned to obtain other documents relative to Taylor's claim, including, but not limited to the document request served upon the City during the discovery period. (App. 493).

On or about the 23rd day of April, 1996 the court refused to extend discovery beyond its May 1, 1996 cut-off, noting the defendants objections. The objections were a surprise and shock to this office. Nevertheless Taylor pressed on hoping to complete discovery and prepare for the trial without creating a huge dispute about failed agreements. (App. 493).

On or about the 24th day of April, 1996 counsel for Taylor conferred in good-faith with Rounds and Lester by joint local and long distance telephone conference initiated by the undersigned. At that time it was agreed the depositions as scheduled would be allowed subject to the court's ruling on the qualified immunity defense. It was further discussed that two of those depositions were non-party depositions necessary for the presentation of plaintiffs' case on damages and other issues. Rounds and Lester agreed that the depositions of Howell and Bohon could be taken as scheduled or taken after a ruling on the qualified immunity defense, the lack of timeliness of the notice notwithstanding. Counsel also agreed to meet and confer together regarding completion of discovery and qualified immunity. (App. 494).

On or about the 26th day of April, 1996 counsel for Taylor met with Mary Rounds, counsel for the city, where the parties again agreed to take the depositions of Howell and Bohon at the same time that we took the other depositions. They were otherwise unable to agree on discovery issues. (App. 494).

On or about May 6, 1996 Taylor and the City through counsel agreed to a dismiss the individual City officials, with the exception of Ham in exchange for the depositions previously scheduled on May 8, 1996; and to conduct interviews, with City and Union representatives listening to the interviews on May 9, 1996. At all times relevant to this agreement the City knew that Taylor was seeking evidence that was probative of his claims and would be necessary to a full and adequate response to its dispositive motions. (App. 494-495).

On May 8, 1996 Taylor agreed with defendant Union's offer to dismiss with prejudice FOP Lodge #103 with prejudice and its members, Don Ray and Bob Steiber. In exchange Taylor sought and obtained Union agreement to allow the depositions of Ray and Steiber and to inquire into areas of selective enforcement of policies and procedures designed to control the Union by Chief Ham and to inquire as to any other matter that was relevant to the wrongful termination of Taylor by Ham. Mr. Moore sought and obtained an agreement from Taylor that he would not inquire as to any conspiracy between the Union grievance committee that refused to represent Taylor on his grievance. (App. 495).

On May 8, 1996 the Defendants announced at the commencement of depositions that they would not produce Jana Howell (*i.e.* damages, due process and arbitration issues) or Mr. D. Bohon (*i.e.* publication of stigmatic reasons for termination) as it was "their intention" that Taylor dismiss all individual parties or Taylor would not be allowed to take all of



the depositions. This was never the agreement. Once again the City thwarted Taylor from being able to collect evidence necessary to prepare for trial and to respond to the dispositive motion. (App. 495).

The City used Bob Steiber to inform the officers regarding Taylor's request for interviews. Intending to interview and collect affidavits that opposed the City's dispositive motions counsel agreed to extend Taylor's response time to Monday, May 13, 1996. (App. 496).

Nearly 90% of the deposition of Steiber is Steiber saying, "I refuse to answer that question on advice of counsel" (App. 570-576). Stieber did answer questions regarding the type of notice that he gave fellow police officers regarding Taylor's request for interviews. Steiber admitted that he advised all he contacted that union counsel Jim Moore had instructed the entire union to not answer any questions, as to material areas of inquiry, such as selective discipline, invasions of privacy, union animus and control, criminal activities occurring, and other matters material to Taylor's inquiries "On advice of counsel". A general notice (App. 504) was Steiber's method of informing them, however Taylor did not know this until the letter was brought to Taylor by a current member of the PCPD. (App. 570-576).

As a result of Steiber's admitted tampering with witnesses and due to the undersigned's personal knowledge that many officers fear retaliation in their employment if they voluntarily come forward with information, the undersigned canceled the interviews. (App. 504).

Taylor and his counsel have been contacted by current officers who are willing to testify and give this court an affidavit, but not without assurance that they will not be harassed or

retaliated against by the City. The undersigned has also been told that the loss of their jobs shall cause severe emotional distress ( at least one officer has killed himself as a result of the manner in which he was terminated) and that they must have protection from this court prior to their granting permission to file their testimony in support of Taylor's claims against the City. (App. 498, 657 and 730).

## REASONS FOR GRANTING THE WRIT

## I.

## THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DISREGARDS THIS COURT'S PRIOR RULINGS ON THE CRUCIAL ROLE OF DUE PROCESS TO DEPRIVATION OF LIBERTY AND PROPERTY.

Taylor's petition should be granted because the opinion below disregards this court's prior rulings on the crucial role of due process to deprivation of liberty and property. The District Court must be reversed or the wilful, oppressive and abusive denial of substantive and procedural due process due Taylor, by the City and Ham, will result in an innocent-accused employee's deprivation of his liberty and property without having a, constitutionally required, impartial pre-termination hearing and a reasonably prompt, full and impartial post-termination hearing. The decisions of the District Court and the Court of Appeals should be reversed inasmuch as they conflict with Amends. I, V and XIV, U.S. Const.; and, *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), at 1496; and, the wilful denial of his bargained-for arbitration hearing and his liberty interest are remedied under 42 U.S.C.A. § 1983.



In granting summary judgment in favor of the City and Ham the federal courts have erred in its ruling on non-hearsay that is pivotal to Taylor's claims of liberty. The errant ruling is reflective of the prejudice Taylor has suffered at the hands of the government and the courts because of apparent criminal conduct committed by Taylor. Taylor was acquitted of all charges by a criminal jury but has been wilfully and arbitrarily denied his property right to grieve his discharge in accordance with a bargained-for collective bargaining agreement. *Loudermill,* and other opinions of this Court grant jurisdiction to the federal court to insure that citizen's liberty and property rights are not deprived without due process of law. *Loudermill, supra*; and *Barry v. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The actions by the City in relation to its discharge of Taylor have been wilful and malicious. They created for Taylor arbitrary policies such as the arbitration shall not be had until after the criminal trial; it was not obligated to honor the contract because Taylor was accused of criminal conduct; it refused to pay for their ½ share of the cost of arbitration; and successfully delayed the arbitration without notice to Taylor. Ham informed the private citizens that Taylor would be fired for having been found guilty of his alleged criminal behavior. Yet, Taylor, to this day still has not received any post-termination hearing consistent with *Loudermill.*

Convinced of that Taylor would be convicted before his arbitration hearing could be had, Chief Ham sought to replace During this process Ham stated to at least one private citizen (who told others) that Taylor was going to be convicted and incarcerated for his criminal behavior and therefore Ham could go ahead and replace Taylor. As a result Taylor suffered a loss of liberty. *See Board of Regents v. Roth*, 408 U.S. 564, 573, 92

S. Ct. 2701, 2707, 33 L. Ed. 2d 548 (1972); *Codd v. Velger*, 429 U.S. 624, 628 97 S. Ct. 882, 884-85, 51 L. Ed. 2d 92 (1977); *Paul v. Davis*, 424 U.S. 693, 710, 96 S. Ct. 1155, 1164-65, 47 L. Ed. 2d 405 (1976); and, *Bishop v. Wood*, 426 U.S. 341, 348 96 S. Ct. 2074, 2079, 48 L. Ed. 2d 684 (1976).

The federal court's judgment and opinion's lay in direct conflict with the constitutional principles espoused in the cases cited above. The actions of the City reflect a horrendous prejudice against Taylor causing it to act as a dictator instead of the fair arbiter of rights that is required here. If Taylor's writ is not granted dictatorship shall reign supreme over constitutional rights and justice.

## II.

## THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE ADOPTION BY THE WESTERN DISTRICT COMPULSORY DISCLOSURE OF EVIDENCE AND IN ORDER THAT TAYLOR MAY MAKE A PROPER RECORD IN OPPOSITION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT.

Taylor's petition for writ of certiorari should be granted because the opinion below conflicts with the adoption by the Western District compulsory disclosure of evidence and in order that Taylor may make a proper record in opposition to the City's motion for summary judgment. The trial court abused its discretion when it ordered Ham to submit to a deposition, only to have Ham refuse, then granted judgment against Taylor. This was an abuse of discretion inasmuch as Taylor's was denied the opportunity to develop liberty interest claim by gathering evidence from Ham. The trial court opined that at best all Taylor could offer as evidence to support his claim that Ham had



impugned Taylor's good name and reputation was inadmissable hearsay. *See* Appendix page 17a.

Taylor contends that the evidence offered to show the slander published by Ham was not "inadmissable evidence." Nevertheless, without the testimony from Ham, the trial court ruled that Taylor was unable to prove his case. The prejudice to Taylor is obvious.

In addition to the foregoing the trial court was made aware that the City, through its police officers were obstructing justice by intimidating witnesses (other officers) from volunteering evidence that would have bolstered Taylor's proof in support of his claims. The court abused its discretion in ignoring Taylor's problems and the City's behavior in tampering with witnesses and depriving testimony, despite court order. FRCP Rule 56(f); and, *DiCesare v. Stuart*, 12 F.3d 973 (10th Cir. 1993).

On March 1, 1996 the U.S. District Court for the Western District adopted compulsory discovery. *See* Local Rule 26.2 of the United States District Court for the Western District of Oklahoma. (Appendix C). Notwithstanding the duty of the defendants in this case to come forth with pertinent information the trial court has allowed them to ignore its orders and intimidate witnesses. This is an abuse of discretion that prohibited Taylor from making a record.

## CONCLUSION

This case presents a question of exceptional importance — whether a collectively bargained for post-termination hearing is a property right that has been deprived Taylor without due process of law as is required by the constitution, and the facts of this case. By denying Taylor's request for injunctive relief the federal court's have allowed the City to avoid the necessity of properly terminating a police officer who was wrongfully accused of criminal conduct. By granting Taylor's petition for certiorari the Court can correct the Tenth Circuit's decision, which defies this Court's longstanding holdings that the government may not deprive public servants of liberty or property without due process of law.

Accordingly, Richard L. Taylor respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX

APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED DECEMBER 30, 1997**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

96-6245 & 96-6258
(D.C. No. 95-CIV-1650-M/L)
(W.D. Okla.)

RICHARD L. TAYLOR, an individual,

Plaintiff-Appellant-
Cross-Appellee,

v.

RAYMOND E. HAM, individually and in his official capacity as Chief of Police of the Ponca City Police Department,

Defendant-Appellee-
Cross-Appellant,

CITY OF PONCA CITY, Oklahoma, ex rel. Ponca City Police Department,

Defendant-Appellee,

and

EVERETTE VAN HOESEN, individually, and in his official capacity as Assistant Police Chief; BOB STIEBER, individually and in his official capacity as President of Fraternal Order of Police, Lodge No. 103; DON RAY, individually and in his

official capacity as Vice President of Fraternal Order of Police, Lodge No. 103 and Grievance Chairperson; FRATERNAL ORDER OF POLICE, Lodge No. 103, an unincorporated association of Ponca City Police Officers; GARY MARTIN,

Defendants.

ORDER AND JUDGMENT*

Before PORFILIO and LUCERO, Circuit Judges, and MARTEN,** District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

Plaintiff Richard Taylor was discharged from his position as an officer with the Ponca City, Oklahoma, police department after being involved in a one-car accident in which he was the driver and the passenger was killed. In appeal No. 96-6245, plaintiff appeals the district court's entry of summary judgment in favor of Chief Raymond Ham and the City of Ponca City on his claims that he was deprived of both property and liberty

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** The Honorable J. Thomas Marten, District Judge, United States District Court for the District of Kansas, sitting by designation.



interests without due process in connection with his discharge. Plaintiff also appeals the district court's denial of his motion under Fed. R. Civ. P. 56(f) for an extension of time to take further discovery before responding to defendants' summary judgment motion.

In appeal No. 96-6258, Chief Ham cross-appeals the district court's May 22, 1996 ruling that he submit to a deposition. Chief Ham objects to the district court having ordered him to submit to discovery before ruling on his qualified immunity defense. In its final order of June 10, 1996, the district court determined that Chief Ham was qualifiedly immune, and entered judgment against plaintiff on all claims. Although the district court's final order obviated the need for Chief Ham to submit to a deposition, he filed the present protective cross-appeal in the event we reverse the district court's ruling on the merits of plaintiff's claims. Chief Ham acknowledges that his cross-appeal will be moot if we affirm the district court's final order of June 10, 1996.

Appeal No. 96-6245

We review the district court's ruling on plaintiff's Rule 56(f) motion under an abuse of discretion standard. *See International Surplus Lines Ins. Co. v. Wyoming Coal Ref. Svs. Inc.*, 52 F.3d 901, 904 (10th Cir. 1995). "When a party files an affidavit under Rule 56(f) for additional discovery time, . . . [t]he trial court may deny the affiant's request for additional time, deny the motion for summary judgment, order a continuance for additional discovery or make such other order as is just." *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1553-54 (10th Cir. 1993) (citations and quotation omitted).

A party seeking time to conduct additional discovery under Rule 56(f) must provide an affidavit identifying what facts are not available and what steps the party has taken to obtain those facts. *See Committee for the First Amend. v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992). "Rule 56(f) may not be invoked by the mere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable. . . ." *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986). "Furthermore, if the party filing the Rule 56(f) affidavit has been dilatory, or the information sought is irrelevant to the summary judgment motion or merely cumulative, no extension will be granted." *Jensen*, 998 F.2d at 1554.

Here, plaintiff did not file an affidavit as such. Rather, his counsel filed a motion and brief, to which he attached his affidavit stating that all factual averments contained in the motion and brief were true to the best of his knowledge. Even if construed as the required affidavit, these documents did not meet the requirements of Rule 56(f). They neither set forth the specific facts plaintiff needed to discover, nor explained how such facts would have been useful to oppose defendants' motion. *See Jensen*, 998 F.2d at 1554-55. Further, the record reflects that plaintiff was dilatory in pursuing discovery before filing the Rule 56(f) motion. Under the circumstances, the district court did not abuse its discretion in denying plaintiff's Rule 56(f) motion.

We turn then, to the district court's grant of summary judgment to Chief Ham and the City of Ponca City on plaintiff's due process claims. We review the grant of summary judgment de novo, applying the same standards as the district court under Rule 56(c). *See Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995).





Plaintiff contended that the City and Chief Ham deprived him of his property interest in employment without due process. Primarily, plaintiff attacked the pretermination process he was given, in part because it did not completely conform to the process outlined in the collective bargaining agreement between the City and the police union. Plaintiff also attacked the post-termination process he was given, alleging that the City had refused to cooperate in the de novo arbitration hearing provided for by the collective bargaining agreement. The district court acknowledged that plaintiff had a property interest in his employment, but concluded that he received all the process he was due under federal law. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-57 (1985) (discussing the pre- and post-termination process due a tenured public employee under federal law).

Plaintiff also contended that defendants deprived him of his liberty interest by making public statements suggesting that he was guilty of the criminal offenses with which he had been charged, without giving him an appropriate name-clearing hearing. The district court concluded that plaintiff failed to establish that defendants infringed his liberty interests. Specifically, the district court determined that plaintiff failed to establish through admissible evidence either that defendants published information about plaintiff that was false and stigmatizing or that the alleged publication of such information foreclosed future employment opportunities. *See, e.g., Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 579 (10th Cir. 1996) (setting forth elements of claim for liberty deprivation).

The district court further ruled that Chief Ham was qualifiedly immune from plaintiff's claims, because plaintiff failed to establish that Chief Ham's actions violated any

constitutional right. *See, e.g., Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 646 (10th Cir. 1988) (holding that, to overcome a qualified immunity defense, a plaintiff must "show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred"). Similarly, the court ruled that plaintiff failed to establish any liability on the part of the City, because he failed to show the deprivation of any constitutional right, much less a causal link between a constitutional deprivation and any custom or policy of the City. *See, e.g., Jenkins v. Woods,* 81 F.3d 988, 993 (10th Cir. 1996) ("To establish municipal liability, a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation [of a federally protected right] alleged.")

Based upon our review of the record, the parties' briefs, and the controlling law, we conclude that the district court properly granted summary judgment to defendants City of Ponca City and Chief Raymond Ham on plaintiff's claims for deprivation of property and liberty interests without due process. We, therefore, AFFIRM the judgment of the United States District Court for the Western District of Oklahoma for substantially the reasons set forth in its Order of June 10, 1996. Our affirmance of the district court's final order moots Chief Ham's protective cross-appeal in No. 96-6258, which is DISMISSED.

Entered for the Court

John C. Porfilio
Circuit Judge



## APPENDIX B — ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA FILED JUNE 10, 1996

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

Case No. CIV-95-1650-M

RICHARD L. TAYLOR, an individual,

Plaintiff,

vs.

CITY OF PONCA CITY, OKLAHOMA ex rel. PONCA CITY POLICE DEPARTMENT, Oklahoma political divisions, et al.,

Defendants.

### ORDER

Before the Court is the Combined Motion for Summary Judgment of defendants[1] City of Ponca City. Oklahoma, ex rel Ponca City Police Department ("City") and Raymond E. Ham

1. On June 4, 1996, plaintiff filed stipulations of dismissal and dismissed the following defendants with prejudice: Everette Van Hoesen, individually and in his official capacity as Assistant Police Chief; Bob Steiber, individually and in his official capacity as President of Fraternal Order of Police, Lodge No. 103; Don Ray, individually and in his official capacity as Vice-president of Fraternal Order of Police, Lodge No. 103 and Grievance Chairperson; Fraternal Order of Police, Lodge No. 103, an unincorporated association of Ponca City Police Officers; and Gary Martin, individually and in his official capacity as City Manager of Ponca City, Oklahoma.

*Appendix B*

individually, and in his official capacity as Chief of Police of the Ponca City Police Department ("Chief Ham"), filed on April 1, 1996 Plaintiff Richard L. Taylor ("Taylor") responded in opposition on May 29. 1996 and the defendants filed a reply brief thereto. Based upon the parties' briefs and evidentiary materials submitted therewith, the Court makes its determination.

This is a civil rights case. Taylor was a police officer in the Ponca City Police Department from September 23, 1985 until his termination on February 17, 1994. On December 18, 1993, Taylor was involved in a single car accident occurring in Kay County in which a passenger, Timothy Michael Morris, was killed. Taylor was charged with manslaughter in the first degree by Joseph A. Wideman. Kay County District Attorney, based upon allegations that Taylor caused the death of Morris while driving under the influence of intoxicating liquor.[2] The official accident report dated December 24, 1993, indicated Taylor's blood alcohol content was .27 at the time of the accident. Adopting the recommendation of Taylor's peer review board, on February 17, 1994. Chief Ham terminated Taylor's employment with the police department.

In this 42 U.S.C. § 1983 action, Taylor alleges the following causes of action against the defendants: 1) deprivation of property and liberty interests in violation of the Fourteenth Amendment. 2) violation of the First Amendment, and 3) conspiracy[3]. Defendants have moved for summary judgment on all of plaintiffs claims.

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2. Taylor was acquitted of all criminal charges in March 1996.

3. Due to the dismissal of defendant Fraternal Order of Police, Lodge No. 103 ("FOP") and its officers, plaintiff agrees his (Cont'd)



*Appendix B*

*Summary Judgment*

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Jones v. Unisys Corp,* 54 F.3d 624, 627-28 (10th Cir. 1995). The evidence and any inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the summary judgment. *Id.* However, "[e]ven under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). "The opposing party . . . must identify sufficient evidence to require submission of the case to a jury." *Jones,* 54 F.3d at 628. Once a movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 586 (1986). "The nonmovant must go beyond the pleadings and, by affidavits or the depositions, answers to the interrogatories, and admissions on file, designate specific facts showing, there is a genuine issue for trial" *Celotex Corp v. Catrett,* 477 U.S 317, 324 (1986) "Rule 56(c) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof." *Brown v. Youth Center at Topeka.* 883 F. Supp. 572, 575 (D. Man. 1995) (citing *Celotex*, 477

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(Cont'd)
conspiracy claim no longer exists. *See* Taylor's Response and Brief in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Response") at 9 (May 29, 1996). The dismissal likewise eliminated Taylor's state claim for the breach of covenant of good faith and fair dealing in contracts against the FOP.

U.S. at 322). "Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial." *Id.* (*Celotex*, 477 U.S. at 323).

*Fourteenth Amendment Claims*

A. Property interest

Taylor alleges defendants deprived him of a property interest in his job by failing to give him the procedural due process he was entitled to under the Fourteenth Amendment to the United States Constitution. The following contentions form the basis of plaintiff's claim:

1) His pretermination hearing was biased because members of the Internal Board of Inquiry and Review ("IBIR"), a three member panel of an officer's peers were intimidated and forced by Chief Ham to recommend his termination;

2) He was terminated solely because of the filing of a felony charge against him and he was treated differently than other officers with alcohol related traffic offenses:

3) At the time of his termination, he had not been found guilty of the criminal offense:

4) He was never given an opportunity to refute the evidence presented against him that supported the reasons for his termination;

5) He was never given a summary of the evidence or notice of the specific factual allegations against him: and



6) The procedures outlined in the collective bargaining agreement and the IBIR were not followed.[4]

The due process clause of the Fourteenth Amendment does not prevent a state from depriving an individual of property or liberty: it only requires a fair procedure be provided for the deprivation *Zinermon v. Burch*, 494 U.S. 113 (1990). In determining whether the plaintiff has been deprived of his right to procedural due process the Court must engage in a two-step inquiry: (1) does the plaintiff possess a protected property interest so that due process protections are applicable, and (2) if so, was the plaintiff afforded the appropriate level of process. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Zinermon v. Burch*, 494 U.S. 113 (1990). It is undisputed that Taylor had a protected property interest in his employment as a Ponca City police officer. Thus, the question remains what process was due the plaintiff to deprive him of that property

> "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. The [ ] public employee is entitled to oral or written notice of the charges against him explanation of the employers evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted

4. To the extent plaintiff argues defendants failed to follow contract or state law procedures, these deficiencies do not implicate rights under the Fourteenth Amendment. *See Russillo v. Scarborough*, 935 F.2d 1167 (10th Cir. 1991).

> extent on the government's interest in quickly removing an unsatisfactory employee."

*Id.* at 546.

Defendants argue plaintiff received all the process that was due before and after his termination. Defendants presented the following evidence in support of their argument that plaintiff was informed of the conduct which was the basis of the allegations against him and that plaintiff was given several opportunities to respond to the charges throughout the police department's disciplinary process:

1) On December 19, 1993, the night after the accident, Chief Ham met with plaintiff at the hospital and told him he would be placed on leave without pay.

2) On December 20, 1993, plaintiff was given a Notice of Investigation listing police department policies and procedures believed to have been violated by plaintiff and the incident where the violations occurred.

3) On December 31, 1993, plaintiff received a second notice about the department's criminal investigation as required under the Collective Bargaining Agreement and this notice informed plaintiff of the Predetermination Hearing to be held on January 7, 1994 at 10:00 a.m.

4) On January 7, 1994, Chief Ham held a predetermination hearing and Taylor submitted a written statement through his attorney.[5]

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5. Taylor had been advised by his attorney not to appear in person.



5) On January 10, 1994, Chief Ham notified Taylor that as a result of the evidence presented at the January 7 hearing, Taylor would be placed on leave without pay.

6) On February 4, 1994, Taylor was notified of a hearing of the IBIR to be held at 9:00 a.m. on February 9, 1994.[6] The IBM panel consisted of Assistant Police Chief Everette Van Hoesen, officer Gary Ingmire and officer Bruce Piel. The Hearing Notice contained a list of alleged violation of police department policies and copies of the applicable pages from the police department policies and procedures manual.[7]

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6. For the first time in his response to defendants' Combined Motion for Summary Judgment, Taylor disputes receiving the February 4 Hearing Notice. *See* Plaintiff's Response at 3 ¶ 8.

7. In the February 4, 1994 Hearing Notice, the IBIR identifier the following violations as a result of Taylor's driving while intoxicated which resulted in the death of another person:

1) 1.1.4 Oath of Office

2) 1 1.5 Code of Ethics

3) 1.1.5a Rules of Conduct:

Art 1. Performance of Duty

Art 2. Conduct Unbecoming of an Officer or Employee

Art 3. Intoxication or Drug Abuse

Art 7. Criminal Law Violations

(Cont'd)

7) On February 17, 1994, after considering the evidence presented at the February 14 hearing, the IBIR issued a report to Chief Ham and recommended Taylor be terminated.[8]

8) On February 17, 1994, Chief Ham notified Taylor he was terminated effective at 5:00 p.m. that day Taylor was also given a copy of IBIR's report,

9) On March 3 and 4, 1994, the FOP grievance committee, chaired by Donald Ray, reviewed Taylor's grievance of his termination. On March 10, 1994, Taylor was notified the grievance committee declined to pursue his grievance.

10) Taylor, with counsel, appeared at a hearing before the City Manager, Gary Martin. On March 29, 1994. Martin Chief Ham's termination decision.[9]

Furthermore, defendants presented evidence plaintiff had additional post termination hearing opportunities, including the right to appeal to the City Commission and binding grievance

(Cont'd)

a. Driving Under the Influence of Alcohol

b. Manslaughter 1st degree — Death resulting while in the commission of a misdemeanor

8. The IBIR received undisputed evidence concerning Taylor's condition the night of the accident as well as testimony from fellow officers in support of Taylor. At Taylor's request, Chief Ham did not attend the IBIR hearing.

9. Taylor's allegation that the City Manager was influenced by Chief Ham is unsupported by any evidence in the record.



arbitration.[10] In support of his claims. Taylor submitted numerous affidavits that contained unsupported conclusory statements and allegations as well as irrelevant matters. The Court finds these affidavits are insufficient under Rule 56(e) of the Federal Rules of Civil Procedure as they do not "set forth such facts as would be admissible in evidence." In addition, many of the affidavits including plaintiffs, do not set forth facts within the personal knowledge of the affiants.

Plaintiff's claim of bias in the IBIR predetermination hearing was supported by the affidavit submitted by officer Bruce Piel on December 7, 1995 stating he only voted for Taylor's termination because Chief Ham impliedly ordered him to do so and he feared retaliation and that the pretermination hearing was "pretextual biased and prejudiced."[11] However, officer Piel's affidavit is contradicted by his subsequent deposition testimony in which Piel admitted that 1) Taylor committed the policy violations as alleged and he believed this at the time he voted as a member of the IBIR 2) he voted to terminate Taylor, 3) Chief Ham "did not order me to vote; it was just an understanding of mine. He did not come out and order me to vote that way", and 4) neither Chief Ham or Assistant Chief Van Hoeson told him if he would be retaliated against if he didn't vote a certain way. See Deposition Testimony of Officer Bruce Piel February 26, 1996, attached as Exhibit J to Defendants' Combined Motion for Summary Judgment (April 1, 1996) ("Defendants' Motion").

10. On April 22, 1994, Taylor gave notice of his intent to pursue arbitration. The City contends it as well as the neutral arbitrator, P.M. Williams, were ready to go forward with arbitration. Plaintiff fails to provide credible evidence to the contrary.

11. Officer Piel gave a revised affidavit on March 22, 1996. *See* Exhibit 3 to Plaintiff's Response.

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Viewing the evidence in the light most favorable to plaintiff as this Court must do, plaintiff has failed to demonstrate any genuine issue of material fact. Plaintiff was advised of the charges against him and, even if he was not notified of the hearing to be conducted by the IBIR, plaintiff was afforded several opportunities afterwards to be heard and to present evidence. The Court concludes the procedures and opportunities afforded the plaintiff were sufficient to satisfy constitutional requirements. Defendants are entitled to summary judgment on plaintiffs claim of deprivation of a property interest without due process.

B. Liberty Interest

Plaintiff alleges defendants deprived him of a liberty interest without due process because Chief Ham disclosed "false, stigmatizing, embarrassing and confidential information."

To prevail on a liberty deprivation claim, the plaintiff must prove both 1) that his good name, reputation honor or integrity was stigmatized, and 2) that the defendants "imposed on him a stigma or disability that foreclosed his freedom to take advantage of other employment opportunities." *Lane v. Town of Dover*, 761 F. Supp. 768, 771-72 (W.D. Okla. 1991) (citations omitted). *See also Walker v. Elbert*, 75 F.3d 592, 597 (10th Cir. 1996). Plaintiff must also prove the that his "dismissal resulted in the publication of information that was false and stigmatizing." *Melton v. City of Oklahoma City*, 928 F.2d 920, 936-38 (10th Cir. 1991). In addition, there must be evidence any false and stigmatizing statements made by the plaintiffs employer occurred "in the course of the termination of employment." *Wulf v. City of Wichita*, 883 F.2d 842, 869 (10th Cir. 1989) (citing Paul v. Davis, 424 U.S. 693, 710 ( 1976)). Defendants argue are entitled



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to summary judgment on this claim because there is no evidence the defendants made any statements which affected plaintiffs ability to obtain future employment.

In support of this claim, plaintiff contends (1) a private citizen, D. Bohon, after speaking to Chief Ham announced to the public that he was going to replace Taylor, and (2) the local newspapers printed articles in which Chief Ham detailed his employment status and criminal charges before he was terminated. Neither contention supports plaintiffs claim.

First, Mr. Bohon, a private citizen, was not plaintiffs public employer so any statements allegedly made by Mr. Bohon will not support a liberty interest claim against the defendants. In additions plaintiff's only evidence of what Chief Ham allegedly told Mr. Bohon was an affidavit given by plaintiffs niece, Stacie Ball. This is clearly hearsay within hearsay. Like the plaintiff in *Lane*, Taylor's evidence is "conclusory on the falsity and stigmatization elements, and tainted with inadmissible hearsay on the publication element." *Lane v. Town of Dover*, 761 F. Supp at 772. Furthermore, there is no evidence that Chief Ham made any statements to the press at any time, let alone during the course of the termination proceedings. According to the newspaper article submitted as evidence by plaintiff, the newspaper stated that Chief Ham "was unavailable for comment" *See* Exhibit 5 to Plaintiffs Response (May 29, 1996). Finally, plaintiff has failed to provide any evidence that his termination by defendants foreclosed opportunities for other employment. While plaintiff states be was denied public employment as a meter reader and as a police officer in other communities, he presented no evidence these opportunities were foreclosed by stigmatizing remarks made by defendants. "A party resisting a motion for summary judgment must do more than make

conclusory allegations." *Lane v. Town of Dover,* 761 F. Supp. at 772 (citations omitted). Defendants are likewise entitled to summery judgment on the plaintiffs liberty interest claim.

*First Amendment Claim*

Plaintiff alleges he was terminated in violation of his right to free speech as protected by the First Amendment.[12] To prevail on this claim, Taylor must satisfy the three-prong test established by the United States Supreme Court in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Under *Mount Healthy*, Taylor must initially show, as a matter of law, that his speech deserves constitutional protection. *Id.* at 287. If the speech is worthy of protection. Taylor must then prove as a factual matter his protected speech was a substantial or motivating factor in the adverse employment decision. *Id.* If Taylor makes such a showing, the burden then shifts to the defendants to prove "by a preponderance of the evidence that [they] would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

As stated Taylor must show his speech is constitutionally protected. To do so, Taylor must establish 1) his statements touched on a matter of public concern, and 2) his interest in commences on matters of public concern outweighs "the interest of the [police department], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See also Moore v. City of Wynnewood*, 57 F.3d

12. Plaintiff seems to argue his right to be pro-active in the union is constitutionally protected free speech. *See* Plaintiff's Response at 9 and 12.



924, 931 (10th Cir. 1995). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record" *Connick v. Myers,* 461 U.S. 138, 147-48 (1983) (footnote omitted). The motive of the speaker will also be considered to ascertain if the speech was calculated to redress personal grievances or address incur section 1983 liability, the custom or policy must be "widespread" and involve a "series of decisions." *Randle v. City of Aurora*, 69 F.3d 441, 447 (10th Cir. 1995) (citation omitted) Finally. "a municipality may not be held liable where there was no underlying constitutional violation by any of its officers," regardless of the municipality's policy or custom. *Hinton v City of Elwood, Kansas*, 997 F.2d 774, 782 (10th Cir. 1993). Plaintiff has failed to identify any custom or policy for which the City should be held liable, let alone demonstrate that the City has a "widespread" policy or "longstanding practice" which caused a violation of plaintiffs constitutional rights. The City is entitled to summary judgment on plaintiffs claims.

*Qualified Immunity of Chief Ham*

Finally, defendants contend Chief Ham is entitled to immunity from suit. The affirmative defense of qualified immunity protects government officials from liability for civil damages unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (citation omitted). Once the immunity defense is raised, the plaintiff initially bears a heavy two-part burden. *Albright v. Rodriguez.* 51 F.3d 1531, 1534 (10th Cir. 1995). A plaintiff must "show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged

violation occurred." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (citation omitted). If the plaintiff fails to show either part of this two-part test, the defendant is entitled to qualified immunity. Contrary to plaintiff's contention, *see* Plaintiff's Response at 14-15, the burden shifts to the defendant only if the plaintiff successfully carries his two-part burden. *Albright*, 51 F.3d at 1535. This Court has already determined plaintiff failed to show any violation of his constitutional rights. Accordingly, Chief Ham is entitled to qualified immunity.

*Conclusion*

Based upon the foregoing, defendants combined motion [Docket # 23] is GRANTED in its entirety.

IT IS SO ORDERED this 10 day of June, 1996.

s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON 6-10-96





**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF OKLAHOMA**

Case No. CIV-95-1650-M

RICHARD L. TAYLOR an individual,

Plaintiff,

vs.

CITY OF PONCA CITY, OKLAHOMA ex rel. PONCA CITY POLICE DEPARTMENT, Oklahoma political divisions, et al.,

Defendants.

**ORDER**

Before the Court are the plaintiffs Motions for Declaratory Judgment, Injunctive Relief and/or Writ of Mandamus and Partial Summary Judgment filed on January 30, 1996. Defendants[1] responded in opposition on April 1, 1996.

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1. On June 4, 1996, plaintiff filed stipulations of dismissal and dismissed the following defendants with prejudice: Everett Van Hoesen, individually and in his official capacity assistant Police Chief; Bob Steiber, individually and in his official capacity as President of Fraternal Order of Police, Lodge No. 103; Don Ray, individually and in his official capacity as Vice-President of Fraternal Order of Police, Lodge No. 103 and Grievance Chairperson; Fraternal Order of Police, Lodge No. 103, an unincorporated association of Ponca City Police Officers; and Gary Martin, individually and in his official capacity as City Manager of Ponca City, Oklahoma.

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Plaintiff Richard L. Taylor ("Taylor") was a police officer in the Ponca City Police Department from September 23, 1985 until his termination on February 17, 1994. On December 18, 1993. Taylor was invoked in a single car accident occurring in Kay County in which a passenger, Timothy Michael Morris, was killed. Taylor was charge with manslaughter in the first degree by Joseph A. Wideman, Kay County District Attorney, based upon allegations that Taylor caused the death of Morris while driving under the influence of intoxicating liquor.[2] The official accident report indicated Taylor's blood alcohol content was .27 at the time of the accident. Adopting the recommendation of Taylor's peer review board, on February 17, 1994, defendant Raymond E. Ham ("Chief Ham") terminated Taylor's employment with the police department.

Taylor brought this action pursuant to section 1983 in title 42 of the United States Code alleging the defendants (1) deprived him of property and liberty interests in violation of the Fourteenth Amendment, (2) violated his First Amendment rights of free speech, and (3) conspired to deprive him of his constitutional rights. In the instant motions, Taylor seeks the following relief from this Court:

1) A declaratory judgment that (a) certain provisions of the Ponca City Police Department manual are unconstitutional (b) the Collective Bargaining Agreement in place at the time of his termination is enforceable, and (c) defendant City of Ponca City, Oklahoma, ex rel Ponca City Police Department ("City"), terminated his employment in violation of the Constitution;

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2. Taylor was acquitted of all criminal charges in March 1996.



*Appendix B*

2) An injunction or writ of mandamus entered that reinstates plaintiff to his former position with back pay and benefits; or alternatively,

3) An injunction or writ of mandamus requiring the city to arbitrate this dispute pursuant to the Collective Bargaining Agreement or partial summary judgment on this issue.

On June 7, 1996, the Court granted defendants' Combined Motion for Summary Judgment in its entirety. In so doing, this Court concluded plaintiff had failed to come forward with sufficient evidence to proceed to trial on his section 1983 claims and the defendants were entitled to judgment as a matter of law. Based upon this ruling, the Court also finds, as a matter of law, that plaintiff cannot demonstrate entitlement to the relief requested in his motions.

*Appendix B*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF OKLAHOMA**

Case No. CIV-95-1650-M

RICHARD L. TAYLOR, an individual,

Plaintiff,

vs.

CITY OF PONCA CITY, OKLAHOMA ex rel. PONCA CITY POLICE DEPARTMENT, Oklahoma political divisions, et al.,

Defendants.

**ORDER**

Before the Court is the plaintiffs Second Motion for Discovery Sanctions and First Request for Extensions of Scheduling Orders and First Request for Continuance of the Trial, filed June 3, 1996.

On June 7, 1996, the Court granted the defendants' Combined Motion for Summary Judgment in its entirety. On that same day, the Court denied plaintiffs Motions for Declaratory Judgment, Injunctive Relief and/or Writ of Mandamus and Partial Summary Judgment.

Accordingly, the plaintiffs second motion for discovery sanctions [Docket #61] is DENIED and plaintiffs first requests for extensions and continuance [Docket #61] is MOOT.



*Appendix B*

**IT IS SO ORDERED** this 10th day of June, 1996.

s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNTIED STATES DISTRICT JUDGE

## APPENDIX C — LR26.2 REQUIRED DISCLOSURE

(**a**) Prior to the first status and scheduling conference, each party shall, without awaiting a discovery request, disclose to all other parties:

(1) The identity of any expert witness the party intends to call, together with the expert's qualifications, a statement of the substance of the expert's expected testimony, and a summary of the grounds for the expert's opinion;

(2) A general description, including the location, of all books, documents, data, compilations, and tangible things in the possession, custody or control of the party that are likely to bear significantly on any claim or defense;

(3) The existence and content of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or to reimburse for payments made to satisfy the judgment; and

(4) The identity of any witness who is known at the time to be likely to bear significantly on any claim or defense.

(**b**) Each party is under a continuing obligation to supplement or to correct the required disclosure if the party obtains additional information which makes previously disclosed information incorrect or incomplete.

(**c**) Every disclosure or supplementation by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes the certification under, and is consequently governed



by the provisions of the Federal Rules of Civil Procedure. In addition, signing constitutes certification that the signer has read the disclosure, and that the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.

(**d**) All exhibits shall be physically exchanged or viewed and examined on or before the date and in the sequence specified in the scheduling order, or if no date is specified, three (3) days prior to the date for the submission of the proposed pretrial order, as no objections to the effect that exhibits have not yet been seen will be entertained in a proposed final pretrial order or otherwise.

(**e**) Unless the Court orders otherwise, the following categories of cases are exempted from the required disclosure provision of this rule: Administrative review cases, prisoner cases, bankruptcy appeals, collection cases commenced by the United States Government, enforcement of administrative summonses, and forfeiture cases.

(**f**) Failure to comply with the requirement of this rule may result in the imposition of sanctions by the Court.

[Effective March 1, 1996]